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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 514

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,
Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 16, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 112 (a)-20(a)) printed in Appendix A hereto (*infra*, p. 50)[1] is reported at 195 F. Supp. 826. The opinion of the Court of Appeals,

[1] "*Infra*" references are to the appendices of this petition.

printed in Appendix A hereto (*infra*, p. 35) is reported at 305 F. 2d 143.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1962 (*infra*, p. 35). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Question No. 1

In *Lincoln Mills* the Court held that under Section 301(a) of the Labor Management Relations Act the rights of *unions* under collective bargaining contracts are federal rights for which the courts are to fashion a federal law of collective bargaining contracts.

Are the individual rights of *employees* under collective bargaining contracts also federal rights for which federal law is to be fashioned?

Question No. 2

Whether, under the federal law of collective bargaining contracts (and as the court below decided, in conflict with the Second Circuit's *Glidden* decision and the Third Circuit's *Viking* decision) the recognition clause (or preamble) of a contract delineates the geographic area within which the employees can exercise their seniority-recall rights?

Question No. 3

Whether, under the federal law of collective bargaining contracts (as the court below refused to rule, in conflict with the Second Circuit's *Glidden* decision and the Third

Circuit's *Viking* decision) the grant to employees of seniority-recall rights in a particular plant implies that those rights continue to adhere to the plant in the event it is moved to a new location, absent an express provision that they do not?

Question No. 4

Whether, under the federal law of collective bargaining contracts, the seniority-recall rights granted employees by a contract are "vested rights" that survive the termination of the contract, in the absence of an express provision that they do not?

STATUTE INVOLVED

The statute involved is Section 301(a) of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952):

> Section 301 (a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Facts

The events that lead up to this action began in January of 1961. Respondent, Ross Gear and Tool Company, Inc. (hereinafter called the Company) is a manufacturer of steering gears with plants in the United State, England, France, Brazil, Austria, Germany and Spain (*infra,* p. 36).

At that time it had two plants in the United States, one in Lafayette, Indiana, and the other in Detroit, Michigan (hereinafter called the Detroit plant) (*infra*, p. 36). At the Detroit plant the Company manufactured steering gears for such customers as Ford Motor Company, Chrysler Corporation, American Motors Coroporation, and International Harvester Company (R. 3a, 29a). It employed approximately 725 seniority employees there (R. 2a).

Petitioners are five seniority employees who worked for the Company at the Detroit plant.

The Company and its predecessor at the Detroit plant had had collective bargaining contracts with the UAW (hereinafter called the Union), since 1936 (*infra*, p. 36); R. 80a). The contract in effect in January of 1961 had been entered into December 19, 1958, and had as its expiration date October 1, 1961 (*infra*, p. 36).

On January 19, 1961, the Company, in a series of notices to its Detroit employees, began warning that it was building a new plant facility in Lebanon, Tennessee, and that it was going to transfer an as yet undertermined number of operations out of the Detroit plant to the Lebanon facility.

At a Company-Union meeting of March 9, 1961, the Union, after finding there were no incentives it could offer the Company that would make it abandon the move, pressed the Company to honor at Lebanon the seniority of the Detroit employees laid off by the move. The Company rejected this idea, explaining that in return for a subsidized plant facility and other advantages promised by the city of Lebanon, it had agreed to hire its work force for the new facility from the Lebanon area (*infra*, pp. 39-40; R. 5a, 31a, 72a).

On March 28, 1961, the Court of Appeals for the Second Circuit decided *Zdanok v. Glidden*,[2] holding that, in the absence of an express provision in the contract to the contrary, the seniority-recall rights employees earn at a plant continue to adhere to it in the event it is moved, and that, in the absence of an express provision to the contrary, those rights are "vested" rights which survive the termination of the company-union contract.

On May 9, 1961, the Union wrote the Company calling its attention to the *Glidden* decision and threatening legal action if the Company did not honor at Lebanon the seniority-recall rights of the Detroit employees laid off by the move by recalling them at Lebanon in accordance with their seniority (*infra*, p. 40).

The Company did not reply to the Union's letter. Instead, on May 22, 1961, it posted a notice announcing that it was moving not just *some* of the operations of the Detroit plant to Lebanon, but the *entire* Detroit plant. The notice stated that the move would begin by July 1, 1961, and that operations of the Detroit plant would be discontinued on or about September 2, 1961 (*infra*, pp. 40-41).

The Proceeding Before the District Court

On June 15, 1961, the Petitioners commenced this action in the United States District Court for the Eastern District of Michigan (*infra*, p. 35). The Petitioners brought the action for themselves and on behalf of the approximately 716 other seniority employees at the Detroit plant (*infra*,

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[2] 288 F. 2d 99 (2d Cir. 1961), *cert. granted on other grounds*, 368 U. S. 814.

pp. 35-36).[3] (Hereinafter the five Petitioners and the approximately 716 other employees will be referred to together as the Employees). The Employees claimed that the Company, in taking the position that it would not recall them from layoff when it resumed the operation of the Detroit plant at Lebanon, was threatening to breach their seniority-recall rights. They prayed for a declaratory judgment, a preliminary injunction, and such other additional remedies as might be appropriate by the time of final hearing (*infra*, p. 36; R. 7a-8a).

Since the employees were claiming on what might be considered their "uniquely personal" seniority rights[4] they sought to head-off any *Westinghouse*[5] problem by basing jurisdiction on diversity, rather than Section 301(a) of the Labor Management Relations Act.[6] (The Company is an Indiana corporation, the Employees are citizens of Michigan, and the amount in controversy exceeds $10,000. (*infra*, p. 36; R. 22)).

The Company raised two defenses. First, that the Employees' seniority-recall rights could be exercised only within the city limits of Detroit and, so, not at Lebanon, Tennessee. Second, that even if the rights did apply at Lebanon they would expire upon the termination of the Company-UAW contract on October 1, 1961 (*infra*, p. 41).

The district court, in an opinion filed July 5, 1961, rejected both these arguments. With respect to the argu-

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[3] The average age of the Detroit plant seniority employees at the time this action was commenced was 48. Their average seniority was 14 years, although one of them had 42 years (R. 4a, 30a).

[4] *IAM Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. denied*, 361 U. S. 884.

[5] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437.

[6] 61 Stat. 156 (1947), 29 U. S. C. §185 (a) (1952).

ment that the Employees' seniority-recall rights applied only at Detroit and not at Lebanon the court said:

> "The Gemmer Division [Detroit] plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate. The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location." (*Infra*, p. 58).

As to the second argument, that even if the Employees' seniority-recall rights *did* apply at the Lebanon facility they would be cut off on October 1, 1961, with the termination of the contract, the district court said:

> "The mere fact that there is a termination date in a collective bargaining agreement does not terminate all the rights and benefits of the employees under that agreement, but merely designates a certain time agreed upon by the parties when there would be further negotiations concerning those rights and benefits. Therefore the fact that this agreement in question has a termination date does not automatically remove all of the rights and benefits previously acquired by the employees. Although, as in this case, the agreement itself with the union as a bargaining agent might have been terminated by the move to Lebanon, the rights and benefits that have accrued to the individual employees persist and cannot be unilaterally denied by the employer without the employees' consent. Among these rights and benefits would be included the right of seniority, as more specifically involved in this case, *the right to be rehired by the employer after a lay-off, as stated in the contract.*" (*Infra*, p. 58).

On July 7, 1961, an order declaring the rights of the parties in accordance with the views expressed in the district court's opinion was entered (*infra*, p. 43).

On July 26, 1961, the Company filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit (R. 125a).

The Proceeding Before the Court of Appeals

Before the court of appeals, the Employees' claim, on the relocation branch of the case, was as follows: Under the seniority article of the collective bragaining contract they had seniority-recall rights at the Detroit plant. A section of the seniority article listed the circumstances under which those seniority-recall rights could be lost and relocation of the plant was not one of the listed circumstances.[7] Therefore, they argued, their seniority rights

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[7] "31. An employee shall lose his seniority and his name shall be removed from the payroll of the Company for all purposes for the following reasons:

(a) If he quits.

(b) If he is discharged and not reinstated through the grievance procedure.

(c) If he has been laid off for a period of twelve (12) consecutive months; provided, however, that no employee shall lose his seniority under this sub-paragraph who has seniority of one year or more at the time of his layoff.

(d) If for any reason he is absent from work for a period of five (5) working days without notifying the employment office of the Company during such period.

(e) If when notified by the Company by registered mail to report for work, after layoff, he fails to report within three (3) working days after receipt of such notice.

(Continued on next page)

at the plant were not cut off by its relocation and they could exercise them at Lebanon. They relied heavily on *Glidden*.

The court of appeals agreed that the seniority article of the contract gave the Employees seniority-recall rights at the Detroit plant (*infra*, pp. 42-43). Without any further

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(Continued from preceding page)

(f) If he gives a false reason for obtaining a leave-of-absence or overstays any such leave more than three (3) working days.

(g) If he receives permanent total disability benefits under a group insurance policy held by the Company. If he ceases to receive such benefits and is re-employed, his seniority, including that which he otherwise would have acquired during the period of his disability, shall be restored.

(h) If he retires and receives a pension under the provisions of the Pension Agreement. If he receives a pension for permanent total disability and is re-employed, his seniority including that which he otherwise would have acquired during the period of his disability, shall be restored.

(i) If he accepts a separation payment under the Supplemental Unemployment Benefit Plan incorporated in this agreement, in which event his seniority shall terminate on the date on which payment of such separation payment is issued by the Company.

(j) As an exception to subparagraphs (d), (e), and (f) above, an employee shall not be deprived of his seniority when his failure to report for work is caused by sickness, injury, accident or other justifiable cause and notice is given the employment office of the Company at the earliest practical time and the employee returns to work as soon as practical. Notice must be by registered mail, telegram, telephone, or other proper and accepted means of communica- subject to verification. The management and the shop committee shall determine the justice of claim that the employee had good reason to fail to report for work. For the purpose of this subparagraph, paragraph 48 shall not apply." (Pp. 21-23 of the collective bargaining contract of 1958 which is bound into the Certified Record after R. 125a; see R. 9a.)

discussion of the seniority article, however, the court turned to the recognition clause of the contract which reads as follows:

> "The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (*Infra*, p. 42).

The court fastened onto the language, "plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit" and held that it prevented the Employees from having seniority-recall rights at Lebanon (*infra*, p. 44-45). The court rejected the concept, applied in *Glidden* and by the district court, that since the plant at the new location was not a *different* plant but merely the old plant in a new location, the Employees' seniority-recall rights continued to adhere to it (*infra*, pp. 44-45).

On the contract termination branch of the case the Employees relied upon the *Glidden* rule that the seniority-recall rights of employees are "vested" rights that do not terminate with the contract between the company and the union. They pointed out that the section of the seniority article which listed the circumstances under which seniority-recall rights are lost provided that a laid-off employee (which all of them would be when the Detroit plant left Detroit for Lebanon) lost his seniority,

> "(c) If he has been laid off for a period of twelve (12) consecutive months; provided, however, *that no employee shall lose his seniority under this subparagraph who has seniority of one year or*

more at the time of his layoff." (Emphasis supplied).[8]

The court failed to rule on the matter.

The court had granted leave to the Michigan Manufacturer's Association to file a brief *amicus curiae*. In its brief the Association argued that state law applied to the case.[9] In its reply brief the Employees argued that the federal law of collective bargaining contracts applied.[10] It would appear from the cases cited by the court (*infra*, p. 45) that it applied a Michigan common law rule of commercial contracts[11] which is also applied in Indiana,[12] West Virginia,[13] and New Jersey.[14]

REASONS FOR GRANTING THE WRIT

In *Lincoln Mills*[15] the Court instructed the lower courts to fashion a federal law of collective bargaining contracts to be applied to the rights and duties made federal by Section 301(a) of the Labor Management Relations Act.[16]

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[8] See note 7, *supra*, p. 8.

[9] Brief for Michigan Manufacturers' Association, Amicus Curiae, pp. 42-48.

[10] Reply Brief for Plaintiffs-Appellees, p. 35. n. 10.

[11] *Standard Oil Co. v. Ogden & Moffett Co.*, 242 F. 2d 287 (6th Cir. 1957).

[12] *Jenkins v. King*, 244 Ind. 164 (1946).

[13] *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676 (1946).

[14] *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F. 2d 5 (3d Cir. 1957).

[15] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448.

[16] 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952).

The four questions presented by this case are questions in this new body of federal law.

On two of them (Question Nos. 2 and 3) the decision of the court below is in conflict with the Second Circuit's decision in *Zdanok v. Glidden Co.*[17] and the Third Circuit's decision in *Metal Polishers Union v. Viking Equipment Co.*[18]

Question No. 1 is the most basic of the four. It asks: whose rights and duties under collective bargaining contracts were made federal by Section 301(a)[19]—just *unions'* and *employers'*, or the individual rights and duties of *employees* as well? If the latter is the case then the Court's *Westinghouse*[20] decision no longer applies and the jurisdiction of the district courts under Section 301(a) must be substantially expanded.

The other three questions deal not with the scope of the new federal law but with its specific content. The Court is asked to review three general rules of collective bargaining contract interpretation (on two of which there is a conflict in the Circuits, as indicated above) and decide whether or not these rules should be included in the new

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[17] 288 F. 2d 99 (2d Cir. 1961). On October 9, 1961, this Court declined to review the decision in *Glidden*, limiting its grant of certiorari to the question of participation by a Court of Claims judge. 368 U.S. 814. On June 25, 1962, this Court affirmed the judgment of the Second Circuit. 370 U.S. 537. On October 8, 1962, this Court denied a motion for leave to file an out-of-time petition for rehearing.

[18] 278 F. 2d 142 (3d Cir. 1960).

[19] 61 Stat. 165 (1947), 29 U.S.C. §185(a) (1952).

[20] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 438 U.S. 437.

federal law. Question No. 2 involves a general rule of recognition clause interpretation and Questions No. 3 and 4 involve general rules of seniority provision interpretation.

The Court has reviewed some general rules of collective bargaining contract interpretation fashioned by the courts in response to the instruction of *Lincoln Mills*. Thus far, however, the review has reached general rules for only a few of the many provisions typically included in collective bargaining contracts. The Court has reviewed a number of rules of arbitration clause interpretation,[21] one rule of welfare plan provision interpretation[22] and two rules of no-strike clause interpretation.[23] In this case we ask the Court to review general rules of interpretation for two of the most basic provisions found in all collective bargaining contracts; the recognition clause and the seniority provision.

Questions No. 2, 3 and 4 are of great practical significance because they arise out of the plant relocation situation. At present the United States is experiencing a wave of such relocations, nearly all of which raise difficult ethical, sociological, and legal problems.[24] It is important to employees, employers, and union that they have a clearer idea of what their rights and duties are in these difficult situations.

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[21] *United Steel Workers v. American Manufacturing Co.*, 363 U.S. 564; *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574; *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95; *Drake Bakeries, Inc., v. Local 50 American Bakery and Confectionary Workers*, 370 U.S. 254; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238.

[22] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459.

[23] *NLRB v. Lion Oil Co.*, 352 U.S. 282; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270.

[24] E. g., Oberer, *The Corporation and the Rank-File Employee*, 343 Annals 95 (1962); 110 U. Pa. L. Rev. 458 (1962); Note, *Vested Rights in the Runaway Shop*, 13 W. Res. L. Rev. 360 (1962); Aaron, *Reflections*

(Continued on next page)

Many of the legal problems that have been generated by plant relocations have already come before the lower federal and state courts and arbitrators and are on their way through the appellate procedures. At present, the courts and arbitrators are going in both directions, some following the *Glidden* and *Viking* decisions[25] and some following the Sixth Circuit's decision in the instant case.[26] It is important, therefore, that this basic conflict be settled before more confusion arises.

As to Question No. 1—In *Lincoln Mills* the Court held that under Section 301 (a) of the Labor Management Relations Act the rights of *unions* under collective bargaining contracts are federal rights for which the courts are to fashion a federal law of collective bargaining contracts.

Are the individual rights of *employees* under collective bargaining contracts also federal rights for which federal law is to be fashioned?

1. The seed of the question was sown in *Westinghouse*, brought to flower in *Lincoln Mills*, and not dealt with (be-

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on the Legal Nature and Enforceability of Seniority Rights, 17 Harv. L. Rev. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Bargaining Contracts: Zdanok v. Glidden Co.*, 48 Va. L. Rev. 201 (1962); Comment, 61 Colum. L. Rev. 1363 (1961); U. S. News & World Report, Dec. 21, 1959, p. 89; U. S. News & World Report, Aug. 7, 1961, p. 81; Commonweal, Sept. 22, 1961, p. 4; Krock, *Issue of Judicial Power to Rewrite Labor Contract*, N. Y. Times, Aug. 18, 1961, p. 20, col. 3; Krock, *Jobs as "Vested Rights" Despite Location Changes*, N. Y. Times, July 21, 1961.

[25] E. g., *Panza v. Armco Steel Corp.*, 51 LRRM 2016 (W. D. Pa. 1962); *Fried et al. v. Glenn Elec. Heater Corp.*, 198 F. Supp. 249 (D. N. J. 1961); *Selb Manufacturing Co.*, 37 Lab. Arb. 834, *enforced sub nom IAM v. Selb*, 49 LRRM 2366 (E. D. Mo. 1961), *affirmed sub nom Selb v. IAM*, 305 F. 2d 177 (8th Cir. 1962).

[26] E. g., *Union Packers, Inc.*, 38 Lab. Arb. 619 (1962); *Philips Chemical Co.*, 39 Lab. Arb. 82 (1962); *H. H. Robertson Co.*, 37 Lab. Arb. 928 (1962); *Sangamo Electric Co. v. Bradley*, 46 L. C. Par. 17843 (App. Ct. of Ill. 1962).

cause not squarely posed) in *Dowd Box*,[27] *Lucas Flour*[28] *Atkinson v. Sinclair Refining Co.*,[29] or *Glidden Co. v. Zdanok*.[30] This case poses the question squarely for it is an action by individual employees asserting important individual rights (seniority-recall rights). It presents the Court with an opportunity to meet the question head-on and settle it.[31]

Westinghouse distinguishes between rights granted the union under a collective bargaining contract and those granted the individual employees covered by it.[32] The Court indicated that neither groups of rights had been made federal by Section 301 (a) since that section created no substantive rights but merely granted the federal courts jurisdiction over certain cases arising out of collective bargaining contracts, to which cases, the Court indicated, the federal courts were to apply state law.[33] Under this analysis the jurisdiction conferred by Section 301 (a) included only suits brought by unions enforcing their own

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[27] *Dowd Box Co. v. Courtney*, 368 U.S. 502.

[28] *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95.

[29] 370 U.S. 238.

[30] 370 U.S. 530.

[31] The fact that the instant case came before the federal district court on diversity jurisdiction rather than Section 301 (a) jurisdiction should not preclude the Court's consideration of Section 301 (a) questions. In both *Dowd Box* and *Lucas Flour* the actions in the state courts were not based on Section 301 (a) but on the state courts' traditional jurisdiction to decide contract cases. But this Court considered the Section 301 (a) questions raised by those cases. Similarly, in *Atkinson v. Sinclair Refining Co.*, Count II of the complaint filed in federal court was based on diversity jurisdiction and not on Section 301 (a).

[32] 348 U.S. at 460.

[33] *Id.* at 449.

rights but not those in which unions, or the individual employees themselves, were seeking enforcement of the employees' individual rights.[34]

In *Lincoln Mills* the Court departed from the *Westinghouse* premise that Section 301 (a) was merely jurisdictional and ruled that it made rights under collective bargaining contracts federal rights (enforceable under a federal statute) for the enforcement of which the courts were to fashion a federal law of collective bargaining contracts.[35]

But there remains a question as to *whose* rights were made federal by Section 301 (a). *Lincoln Mills* involved a union right (the right to have the employer perform his promise to arbitrate) and established that particular union right as within the scope of the Section. But, in a footnote, Justice Douglas acknowledged the *Westinghouse* distinction between union rights and the individual rights of employees but without indicating whether the latter, like the former, have been reached by the federalizing action of the Section.[36]

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[34] *Id.* at 460. Justice Frankfurter reasoned that even though suits by unions did not involve federal rights (since Section 301 granted none) such suits nevertheless could be considered embraced within Article III, Section 2 of the Constitution because of the intimate relationship between unions and a federal statute, the Labor Management Relations Act. *Id.* at 45. He did not believe, apparently, that the same could be said for suits involving only the individual rights of employees.

[35] "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." 353 U.S. at 457.

[36] "[*Westinghouse*] is quite a different case. There the union sued to recover unpaid wages on behalf of some 4000 employees. The basic

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Lincoln Mills made union rights under a collective bargaining contracts federal rights under Section 301 (a) but left unanswered the question of whether individual rights are also cognizable under the Section.

Nor have any of the Court's subsequent Section 301 (a) decisions answered the question, although some have come very close to it.

In *Dowd Box* the employer repudiated a recently negotiated contract claiming that its representative had been acting without authority so that the resulting contract was invalid. Officers of the local and international union brought an action in state court for a declaration that the contract had been effectively executed and so was valid and binding and for an accounting and damages for wages called for under the contract but not paid.[37]

The employer unsuccessfully argued to the trial court and the Supreme Judicial Court of Massachusetts that since the action was on a collective bargaining contract the federal courts had exclusive jurisdiction over it under Section 301 (a). This Court, in addressing itself to the case, assumed without deciding that the case was one which could properly be brought in federal court under Section 301 (a) and went straight to the question of whether, this being so, the state court was possessed of concurrent jurisdiction over it.[38] The Court decided that it was.

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question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer." 353 U.S. at 456, note 6.

[37] 368 U.S. at 504.

[38] "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Id.* at 507.

It appears to have been assumed by this Court, without reference to *Westinghouse*, that the action was within the Section 301 (a) jurisdiction of the district court. As indicated, one of the plaintiffs' claims was for wages owed but not paid the individual employees. The right to wages is an individual right, as the Court made clear in *Westinghouse*. Therefore, had the Court in *Dowd Box* actually *decided* either "*Yes*", that a claim for wages *is* within the scope of Section 301 (a), or "*No*", that it is *not*, the question of whether the individual rights of employees are included within the Section's coverage would have been answered.

Lucas Flour began as an action in state court by an employer against a union for breach of a no-strike clause. The question the case brought to this Court was whether or not state courts (in exercising their concurrent jurisdiction over suits which could properly be brought under Section 301 (a) must apply the federal law of collective bargaining contracts. The Court said they must.

In some quarters this ruling is regarded as an answer to the question of whether the individual rights of employees are included among the rights made federal by Section 301 (a). The reasoning involved is as follows: If the state courts have to apply the federal law in collective bargaining contract cases coming before them, then the federal courts have to apply it in exercising diversity jurisdiction. Since the cases coming before the federal courts on diversity jurisdiction are the individual rights cases that have been frightened there by *Westinghouse* this means the federal law applies to such cases and individual rights must be covered by Section 301 (a).

The error in this line of reasoning is that this Court has not yet said to the state courts that they must apply the

federal law in *all* collective bargaining contract cases regardless of whose rights are involved. Instead, it has merely instructed them to apply the federal law in "suits of a kind covered by Section 301 (a)".[39] As yet, however, it has not decided whether suits on the individual rights of employees are suits of that kind.

In *Atkinson v. Sinclair*, the Court again came very close to the question. The case involved an action in federal court by an employer against a union and union officers for breach of a no-strike clause. Count I of the complaint was against the union and the Court ruled it was within Section 301 (a). Count II was against individual union officials and was based on diversity jurisdiction, the employer apparently having been apprehensive that if he tried Section 301 (a) jurisdiction he might be ousted on the ground that individual duties cannot be enforced under the Section. This Court, however, concluded that since Count II was against union officials it was really against the union like Count I. Since it was against the union, the Court continued, it was within Section 301 (a) and under that section it did not state a cause upon which relief could be granted since the federal law of collective bargaining contracts includes Section 301 (b) which clearly provides that a union's liability cannot be shifted to its officials.[40]

However, as the Court indicated in a footnote, had Count II been aimed at the duties of individual employees who were *not* acting in a union capacity, there would have been a question as to whether or not the Count was within Section 301 (a).[41] In that footnote, therefore, as in the *Lin-*

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[39] 369 U.S. at 103.

[40] 370 U.S. at 246-48.

[41] "In reaching this conclusion, we have not ignored the argument that Count II was drafted in order to anticipate the possible union defense under Count I that the work stoppage was unauthorized by the

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coln Mills footnote, the Court continued the distinction between union rights and duties and the rights and duties of individual employees. Again the Court acknowledged that there is a question as to whether or not the latter are included within the coverage of Section 301 (a).

Finally, in *Glidden Co. v. Zdanok*, the Court again (and again in a footnote) raised the question of whether or not suits on the individual rights of employees are within Section 301 (a).

As will be developed in greater detail *infra*, *Glidden* is almost identical in its facts to the instant case. The employer moved its plant from New York to Pennsylvania and refused to honor the seniority-recall rights of the New York employees when it resumed operations in Pennsylvania. Five of the New York employees filed suit in federal district court for damages for breach of their seniority-recall rights. The suit was not founded on Section 301 (a) jurisdiction but on diversity. The district court denied relief,[42] and the Court of Appeals for the Second Circuit reversed.[43]

The employer petitioned for certiorari, asking the Court to review the merits of the case and the constitutional question of whether or not a Court of Claims judge can sit on a Court of Appeals. The Court granted the writ as to only

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union, and was a wildcat strike led by the 24 individual defendants acting not in behalf of the union but in their personal and non-union capacity. The language of Count II contradicts the argument, however, and *we therefore do not reach the question of whether the count would state a proper §301 (a) claim if it charged unauthorized, individual action.*" 370 U.S. at 249, note 7. (Emphasis supplied).

[42] 185 F. Supp. 441 (S.D. N.Y. 1960).

[43] 288 F. 2d 99 (2d Cir. 1961).

the latter question.[44] In its decision the court noted that the Second Circuit had applied state law to the collective bargaining contract question that was before it on diversity jurisdiction.[45] In a footnote, the court indicated that had its grant of certiorari included a review of the merits it would have faced the question of whether the Second Circuit was right in applying state rather than federal law.[46] It would appear that the Court was considering that while the facts that the case was in federal court on diversity jurisdiction suggested the application of state law, the fact that the suit was on the individual rights of employees under a collective bargaining contract suggested federal law.

It remains unclear, we respectfully submit, whether the rights and duties made federal by Section 301 (a) include the individual rights of employees as well as those of unions. We petition the Court, therefore, to take this question out of the footnotes and decide it.

2. It is important to the lower federal courts that the question be settled. If *Westinghouse* no longer applies and suits on individual rights can be brought under Section 301 (a), the lower courts will have to expand their jurisdiction as they are presently exercising it. Thus far, almost without exception, they have disclaimed Section 301 (a) jurisdiction over such suits.[47]

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[44] 368 U.S. at 814.

[45] 370 U.S. at 537.

[46] "Under our limited writ of certiorari, 368 U.S. 814, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf. *Teamster's Local 174 v. Lucas Flour Co.*, 369 U.S. 95." 370 U.S. at 537, note 8.

[47] *United Steelworkers v. Pullman Standard Car Mfg. Co.*, 241 F. 2d 547 (3d Cir. 1957); *Textile Workers Union v. Bates Mfg. Co.*, 158 F.

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3. We believe that if the Court addresses itself to this question it will rule that the individual rights of employees, as well as all other rights under collective bargaining contracts, are federal rights under Section 301 (a).

As to Question No. 2—Whether, under the federal law of collective bargaining contracts (and as the court below decided, in conflict with the Second Circuit's *Glidden* decision and the Third Circuit's *Viking* decision) the recognition clause (or preamble) of a contract delineates the geographic area within which the employees can exercise their seniority-recall rights?

1. This is an important question in the federal law of collective bargaining contracts which has not been, but should be, answered by this Court.

Virtually all collective bargaining contracts have recognition clauses.[48] It is a long standing axiom that the function of such clauses is to describe the bargaining unit

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Supp. 410 (D. Me. 1958); *Textile Workers Union v. Williamsport Textile Corp.*, 138 F. Supp. 407 (M. D. Pa. 1955); *Local 180, UAW v. J. I. Case Co.*, 185 F. Supp. 130 (E.D. Wis. 1960); *Local 2040, Int'l. Ass'n of Machinists v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884; *Kosley v. Goldblatt Bros., Inc.*, 251 F. 2d 558 (7th Cir. 1958), *cert. denied*, 357 U.S. 904; *ILGWU v. Jay-Ann Co.*, 228 F. 2d 632 (5th Cir. 1956); *Communications Workers v. Ohio Bell Tel. Co.*, 160 F. Supp. 822 (N.D. Ohio 1958), *affirmed*, 265 F. 2d 221 (6th Cir. 1959), *cert. denied*, 361 U.S. 814; *Garfield Local 13-556, Oil Workers Union v. Heyden Newport Chem. Corp.*, 172 F. Supp. 230 (D.N.J. 1959); *Giba v. IUE*, 50 LRRM 2299 (D. C. Conn. 1962); *Consolidated Laundaries Corp. v. Kraft*, 185 F. Supp. 631 (S.D. N.Y. 1960). *Contra, Fried v. Glenn Electric Heater Corp.*, 198 F. Supp. 248 (D.N.J. 1961).

[48] 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 70:61 (1960).

represented by the union and covered by the contract.[49] The Sixth Circuit's rule in the instant case that such clauses delineate the geographic area within which employees can exercise their seniority-recall rights, rather than simply describe the bargaining unit, is, therefore, a clear departure from well settled concepts as to the nature and function of such clauses. A rule which would have such a drastic and wide-spread effect upon existing collective bargaining contracts should be reviewed by this Court before it becomes a rule of the federal law of collective bargaining contracts.

The novelty of the Sixth Circuit's rule can be seen by what happened in this case. The Employees relied on the seniority article of the contract, which gave them seniority-recall rights at the Detroit plant and which did not include plant relocation as one of the circumstances that cut off those rights (see pp. 8-9, *supra*). In dealing with this

[49] "*Recognition clauses often identify the employees covered by the contract* in general terms such as 'production and maintenance employees' or 'hourly-paid employees' or the unit certified by the NLRB. Occasionally *the unit is identified* as being composed of employees whose jobs and rates are listed in the agreement." (Emphasis supplied). *Id.* at 70:121 (1960).

"Recognition clauses, which appear in virtually all union contracts, generally have two parts: designation of the union as the exclusive bargaining agent *for the employees covered by the agreement and a description of the type of employees covered.*" (Emphasis supplied). *Id.* at 70:61.

"Under the Taft Act, the business of writing recognition and related clauses has become largely routine—for two main reasons: first, the union representing a majority of employees in the appropriate *bargaining unit* must be recognized as the exclusive bargaining agent; and second, *coverage of the contract* is fixed to a large degree by the NLRB's determination of the appropriate *bargaining unit.*" (Emphasis supplied). *Id.* at 70:1.

For cases in which courts, the NLRB, and arbitrators have had recourse to the recognition clause's function of describing the bargaining unit, see e. g., *IAM Local 1912 v. United States Potash Co.*, 270 F. 2d 496, 499 (10th Cir., 1959); *cert. denied*, 363 U.S. 845, and the cases cited at 499; *Lewis v. Fentress Coal & Coke Co., Inc.*, 160 F. Supp. 221 (M. D. Tenn. 1958), *affirmed* 264 F. 2d 134 (6th Cir. 1959); *Sterling Faucet Co.*, 119 NLRB 1225 (1950); *Tom Thumb Stores, Inc.*, 123 NLRB 833 (1959); *Tacoma Printing Pressmen's Union*, No. 44, 131 NLRB 1090 (1961); *Loew's Inc.*, 32 L. A. 740 (1959). See also *United Steel Workers v. New Park Mining Co.*, 273 F. 2d 352 (10th Cir. 1959).

claim the court of appeals virtually ignored the seniority article and turned instead to the recognition clause:

> "The Company recognizes the union as the exclusive representative of its employees in its *plant or plants which are located* in that portion of the greater Detroit area which is located *within the city limits of Detroit* for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (*Infra*, p. 42; emphasis supplied).

The Court held that the phrase "plant or plants which are located * * * within the city limits of Detroit" limited the employees' seniority-recall rights to the city limits.

Plainly this language has but one function: to describe the bargaining unit of employees represented by the Union and, so, covered by the contract. It describes the unit as consisting of the employees in the Company's plant or plants located within the city limits of Detroit. The reference to "plant or plants" rather than just "plant" (since the Company had only one plant within the city limits) is a provision for the automatic expansion of the bargaining unit to include any additional plants the Company might build or acquire within the city limits during the term of the contract. Such provisions are typical.[30]

The only thing the recognition clause has to say about seniority-recall rights (as well as all other employee rights granted by the contract) is who gets them—namely, the employees in the bargaining unit described in the recognition clause. The substance of the rights themselves is described in the seniority article.

The Sixth Circuit's concept that the recognition clause not only describes the bargaining unit but, in addition, de-

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[30] "Recognition of the union in new plants is sometimes mentioned in contracts. *Recognition may be automatic in plants established within a specified area*—or it may be negotiable." (Emphasis supplied). 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 70:61 (1960).

lineates the geographic area within which the employees' seniority-recall rights can be exercised is indeed an innovation.[51] We have not discovered another case in which a judge or arbitrator even intimated that the clause has this additional function. The novelty of the rule is suggested by the fact that the court did not cite a single authority in support of it.

2. Not only is the Sixth Circuit's rule a clear departure from settled principles, but it is in conflict with the Second Circuit's decision in the *Glidden* case and the Third Circuit's decision in *Metal Polishers Union v. Viking Equipment Co.*[52]

In *Glidden* one of the company's two defenses was the recognition clause of the contract, which included by reference a geographic description set out in the preamble. The preamble and recognition clause read as follows:

> "This Agreement Made and Entered into at New York, New York, by and between the Glidden Company, Durkee Famous Foods Division, *for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York*, hereinafter referred to as the 'Company', and General Warehousemen's Union, Local 852, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

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[51] What if, for example, the seniority article granted employees laid off at the Detroit plant preferential hiring rights at the Company's Lafayette plant (which is covered by a completely separate contract)? Under the Sixth Circuit's ruling it would be impossible for Detroit employees to exercise those rights since the plant at which they would be exercising them is not "within the city limits of Detroit."

[52] 278 F. 2d 142 (3d Cir. 1960).

AFL-CIO, hereinafter referred to as the 'Union.'[53] (Emphasis supplied).

"Article I Recognition

"1. The Company recognizes the union as the exclusive representatives of all hourly paid production, maintenance and service employees of the Company at the plant facilities *named above* for the purpose of collective bargaining with respect to rates of pay, hours of employment, fringe benefits, and other terms and conditions of employment." (R. 71a; emphasis supplied).

The company argued that the language "plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York" limited the exercise of the employees' seniority-recall rights to that location so that when the plant was moved away from it, the employees' rights could not reach it.

The Second Circuit refused to attribute this function to the recognition clause. As the court put it, the geographic description in the recognition clause was merely the contract's *descriptio personae* (*infra*, p. 70). The court, in this Latin phrase, expressed the traditional concept of the function of recognition clauses and the geographic descriptions typically included in them: to describe the bargaining unit (persons) for whom the employer recognizes the union as the exclusive bargaining agent. As the Second Circuit ruled, in keeping with the traditional view, the geographic description the company relied on simply described the bargaining unit and described it as the employees in the company's "plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

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[53] *Zdanok v. Glidden Co.*, 185 F. Supp 441, 448, note 27 (S.D. N.Y. 1960). (*Infra*, p. 67).

In *Metal Polishers Union v. Viking Equipment Co.*, the plant was located in East Orange, New Jersey. During the term of the contract the company shut it down, moved it to Pennsauken, at the other end of the state, and reopened it there. The company took the position that the relocation had cut off all rights under the contract and refused to honor it. The union sued under Section 301 (a) for breach of the contract.

The preamble of the contract read as follows:

> "Agreement entered into this First day of June, 1957, between Viking Company, *doing business in East Orange, and in the State of New Jersey*, hereinafter called the Employer; and Metal Polishers, Buffers, Platers & Helpers' International Union, Local #44, affiliated with the American Federation of Labor, hereinafter called the Union, which Union is entering into this contract on behalf of the Employees thereof now employed and hereafter to be employed by the Employer."[54] (Emphasis supplied).

The District Court, in its Oral Conclusions, found that the geographic description supported the company's contention that the contract rights could be exercised only in East Orange and, therefore, had been cut off by the relocation.

> "In the court's estimation, an examination of the contract leads the court to the conclusion that it is implicit therein that the contract applies to the area in which the company was then doing business. There are a number of things that lead the court to this conclusion. In the first paragraph it says: 'AGREEMENT entered into this First day of June between VIKING COMPANY, doing business in East Orange * * *'"[55]

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[54] Brief for Plaintiffs-Appellees, p. 25.

[55] *Ibid.*

The Court of Appeals for the Third Circuit, however, took a different view:

> "We disagree with the District Court *in his interpretation of the contract. We do not think it is to be interpreted as applicable only to defendant's activities in East Orange, New Jersey. And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken.* * *" (*Infra*, p. 76; emphasis supplied).

The Third Circuit, like the Second, has rejected the Sixth Circuit's rule that the geographic descriptions typically included in the recognition clauses (or preambles) of contracts delineate the geographic area within which rights under the contract can be exercised.

3. We petition the Court to grant certiorari so that this conflict between the Sixth Circuit and the Second and Third Circuits will be resolved and so that the Sixth Circuit's novel rule will be reviewed before it becomes a part of the federal law of collective bargaining contracts.

As to Question No. 3—Whether, under the federal law of collective bargaining contracts (and as the court below refused to hold, in conflict with the Second Circuit's decision in *Glidden* and the Third Circuit's decision in *Viking*) the grant to employees of seniority-recall rights at a particular plant implies that those rights continue to adhere to the plant in the event it is moved to a new location, absent an express provision that they do not?

1. This is an important question in the federal law of collective bargaining contracts which has not been, but should be, decided by this Court.

The question is of great practical importance, for while virtually all contracts grant employees seniority-recall rights at a particular plant, the vast majority do not include provisions as to whether or not those rights are to continue to adhere to the plant if it is moved.

Petitioners urged upon the court below the rule that the grant of seniority-recall rights at a plant implies that the rights adhere if the plant is moved, in the absence of an express provision that they do not. Petitioners pointed to the fact that the contract gives them seniority-recall rights at the Detroit plant; to the fact that the plant at Lebanon is merely the Detroit plant relocated; and to the further fact that the section of the seniority article that lists the circumstances which cut of seniority-recall rights does not include relocation (see pp. 8-9, *supra*).

The court of appeals agreed that the contract gives petitioners seniority-recall rights at the Detroit plant (*infra*, pp. 42-43). It also agreed that the Lebanon plant was merely the Detroit plant relocated.[56] But the Court rejected the rule of implication.[57]

2. While the rule was rejected by the Sixth Circuit, it was applied by the Second Circuit in *Glidden*[58] and by the

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[56] "It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation * * *." (*Infra*, p. 45).

[57] "The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. * * * *We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer [Detroit] plant in Tennessee.*" (*Infra*, pp. 44-45; emphasis supplied).

[58] "But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. * * *

"* * * Contracts must, in all fairness, be construed *ut res magis valeat quam pereat.*" (*Infra*, p. 70).

Third Circuit in *Viking*, where the court held none of the contract rights to have been cut off by the move:

> "We do not think it [the contract] is to be interpreted as applicable only to defendant's activities in East Orange, New Jersey. *And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken.*" (*Supra*, p. 28; emphasis supplied).

3. We urge the Court to resolve this conflict and settle the rule.

As to Question No. 4—Whether, under the federal law of collective bargaining contracts, the seniority-recall rights earned by employees under a contract are "vested" rights that survive the termination of the contract, in the absence of an express provision that they do not?

1. This is an important question under the federal law of collective bargaining contracts which has not been, but should be, decided by this court.

Petitioners urged upon the court of appeals the rule that the seniority-recall rights employees earn under a contract are "vested" rights that survive the termination of the contract, in the absence of an express provision that they do not. The court, however, failed to apply the rule.

It is common for the seniority articles of collective bargaining contracts to grant employees recall rights by the term. The following is a typical provision: Employees who are laid off and who have one year of seniority shall retain their right to be recalled from layoff for one year; employees with five or more years of seniority shall retain

their right to be recalled from layoff for two years.[59] Counsel for Petitioners is unaware of any collective bargaining contract which provides expressly whether or not such terms of recall rights are cut off by an intervening termination of the collective bargaining contract. This question, therefore, has wide application to the collective bargaining contracts now in existence.

In the instant case the question of whether or not the employees recall rights would survive the termination of the contract was posed by the relocation situation. The question was: If the employees' recall rights *do* reach the plant

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[59] "A maximum period of layoff, after which rehiring and seniority privileges are lost, is specified by 63 percent of agreements [included in the 400 agreement sample]. This maximum layoff period is the same length for all employees in 38 percent of contracts, as opposed to 25 percent which vary the period of rehiring rights according to the employee's length of service. Of those with the same period for all, more than two-fifths set one year as the cutoff date on rehiring rights. Another quarter specify two years. The remainder of these provisions are divided about equally among limits of less than a year, a year and one-half, and three years.

"Where the period of rehiring rights is linked to the seniority record, practice is divided. *About two-thirds of the clauses keep employees on rehiring and seniority lists for a period equal to their service with the company, but set a maximum period nevertheless—five years is the most frequent limit set*, with 1, 2 and 3 years appearing slightly less frequently. The others provide periods based on different categories of seniority; for example, employees with three months' service retain rehiring rights for one year, those with one to five years' service for two years, those with over five years' service for three years. About one in 20 provides for retention over a period equal to half of accumulated service credit.

"Registration during layoff to indicate continued desire to return is referred to in 10 percent of agreements. *Some of these extend rehiring and seniority rights indefinitely* as long as the employee regularly notifies the company at set intervals of willingness to return. Others provide that on employee request when the normal cutoff date is reached, he will be kept on the rehiring list for an additional period. (Emphasis supplied). 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 75: 7-8 (1961).

at the new location, will they nevertheless be cut off by the termination of the contract between the Union and the Company on October 1, 1961? There are, however, many other commonplace situations in which the question is posed and has critical significance. Suppose, for example, that when the collective bargaining contract terminates the employer closes the plant because of bad business. In two years, however, he experiences a change in fortune and decides to reopen it. There is no collective bargaining contract in existence. In manning the plant upon reopening it will the employer be under an obligation to recall those of his old employees whose recall rights are for terms in excess of two years, or will he be at liberty to disregard them and hire completely new employees? The answer depends upon whether or not the employees' seniority-recall rights survived the termination of the contract between the employer and the union.

Another example. A number of the employees are on layoff as of the time the collective bargaining contract between the employer and the union terminates. The employer files a decertification peition with NLRB and the union loses the election. The union is out of the picture and there is no contract. Will the employees who were on layoff as of the time the contract terminated be entitled to be recalled when the employer increases its force, or will they be subject to being replaced by new employees? The answer depends on whether or not the empolyees' recall rights are "vested" rights which survived the termination of the employer-union contract.

In *Glidden* the Court of Appeals for the Second Circuit ruled that the seniority-recall rights which employees earn under a contract between their employer and the union are "vested" rights and are not cut off by the intervening

termination of the contract.[60] We believe the rule applied by the Second Circuit but not applied by the Sixth should be the settled rule of the federal law of collective bargaining contracts and urge the Court to grant certiorari so that the rule may be reviewed and adopted as the federal rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[60] The *Glidden* rule was recently followed by the NLRB in *Bethlehem Steel Co.*, 50 LRRM 1013, 1015 (1962). The Board reasoned that since seniority rights survive the termination of the contract an employer is under a duty to continue honoring them from the termination of the contract to such time as an impasse in bargaining or agreement is reached.